86 - 1263

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES MICHAEL HENRICH, PETITIONER,

v.

THE STATE OF TEXAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTORIARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL CIRCUIT

MELVYN CARSON BRUDER
11817 Quincy Lane
Dallas, Texas 75230
(214) 351-5597

EDGAR A. MASON
12221 Merit Drive
Suite 850
Dallas, Texas 75229
(214) 991-0200

Counsel for Petitioner

28 pp

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner's rights under the Sixth and Fourteenth Amendments were violated by the admission at his trial of incriminating statements made by the Petitioner to a co-defendant, who was an undisclosed prosecution informant, after a complaint had been filed and after the prosecutor was aware that the Petitioner was represented by counsel.

LIST OF PARTIES

The parties to the proceedings in the Texas Court of Appeals for the Fifth Supreme Judicial District are:

Charles Michael Henrich

The State of Texas

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i
LIST OF PARTIES i
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
STATEMENT OF JURISDICTIONAL GROUNDS 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE PETITION 4
CONCLUSION 9
CERTIFICATE OF SERVICE 10
APPENDIX A
Opinion of the Texas Court of Appeals
Henrich v. State, No. 05-82-00818-CR, 21, 1985, 12 December 1983 ..... A-1
APPENDIX B
Opinion of the Texas Court of Criminal Appeals
Henrich v. State, No. 140-84, 24 July 1985 ..... B-1
APPENDIX C
Opinion of the Texas Court of Appeals
Henrich v. State, No. 05-82-00819-CR, 25 September 1985 ..... C-1

TABLE OF AUTHORITIES

CASES:

Alcorta v. Texas, 355 U.S. 28 (1957) 8
Brewer v. Williams, 430 U.S. 387 (1977) 5
Chapa v. State, 420 S.W.2d 943 (Tex.Cr.App. 1967) ... 6
Henrich v. State, 666 S.W.2d 185 (Tex.App.—Dallas 1983) 697 S.W.2d 841 (Tex.App.—Dallas 1985) 1,2
Henrich v. State, 694 S.W.2d 341 (Tex.Cr. App. 1985) 1
Kuhlman v. Wilson, ____ U.S. ____, 106 S.Ct. 2616 (1986) 5,6
Maine v. Moulton, ____ U.S. ____, 106 S.Ct. 477 (1985) .....passim
Massiah v. United States, 377 U.S. 201 (1964) .....passim
Michigan v. Moseley, 423 U.S. 96 (1975) 7
Moran v. Burbine ____ U.S. ____, 106 S.Ct. 1135 (1985) 5,8,9
Miller v. Pate, 386 U.S. 1 (1967) 8
Powell v. Alabama, 287 U.S. 45 (1932) 5
Rochin v. California, 342 U.S. 165 (1952) 8
Spano v. New York, 360 U.S. 315 (1959) 5
United States v. Henry, 447 U.S. 264 (1980) 5,6,9
United States v. Wade, 388 U.S. 218 (1967) 7
Wooldridge v. State, 653 S.W.2d 811 (Tex.Cr.App. 1983) 6

CONSTITUTION:

United States, amend. VI .....passim
United States, amend. XIV 2,5,8

STATUTES:

28 U.S.C. § 1257(3) 2
Tex.Code Crim.Pro. art. 15.04 6

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES MICHAEL HEINRICH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTORIARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL CIRCUIT

Charles Michael Henrich, Petitioner, petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals for the Fifth Supreme Judicial District affirming the Petitioner's conviction.

OPINIONS BELOW

The opinion of the Texas Court of Appeals reversing the Petitioner's conviction on 12 December 1983, is reported at 666 S.W.2d 185, and is reproduced in Appendix A, *infra.*

The opinion of the Court of Criminal Appeals of Texas reversing the judgment of the Court of Appeals, delivered on 24 July 1985, is reported at 694 S.W.2d 341, and is reproduced in Appendix B, *infra.*

The opinion of the Texas Court of Appeals affirming the Petitioner's conviction following the remand from the Court of Criminal Appeals, delivered on 25 September 1985, is reported at 697 S.W.2d 841, and is reproduced in Appendix C, *infra.*

JURISDICTION

The judgment of the Texas Court of Appeals became final on 22 October 1986, when the Court of Criminal Appeals refused the Petitioner's motion for rehearing filed following that court's refusal of the Petitioner's petition for discretionary review.

On 16 December 1986, Mr. Justice White extended the time within which to file a petition for writ of certiorari herein to 20 January 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

In July 1981, the Petitioner, then an employee of Lone Star Gas Company, was questioned by his employer about irregularities that had been discovered in shipping records subject to the Petitioner's control, and was thereafter suspended. Within a few weeks, Lone Star Gas Company filed a complaint with the Dallas District Attorney charging the Petitioner and Walter Lowe with theft of money from the company. Assistant district attorney Steve Khoury then sent letters to the Petitioner and Lowe advising them of the complaint. Following a joint conference between the co-defendants and an attorney at which defensive strategy was discussed, each co-defendant retained separate counsel. The Petitioner's counsel contacted Khoury, identified himself as the Petitioner's counsel, and inquired of the nature of the complaint. Thereafter, Lowe and his counsel went to Khoury's office at which time Lowe agreed to cooperate with the State against the Petitioner. At Khoury's insistence and under his direction, Lowe placed and surreptitiously recorded three telephone calls to the Petitioner for the purpose of eliciting statements from the Petitioner of an incriminating nature. The recordings of those calls, which contained inculpatory statements made by the Petitioner, were admitted into evidence at the Petitioner's trial.

How the issue was raised in the state courts

The Petitioner filed a pretrial motion to suppress which sought the exclusion of the recorded telephone conversations. Following a hearing on such motion, the trial court denied the motion.[1] At such hearing, the Petitioner argued that since the telephone conversations were initiated by Lowe at the prosecutor's instigation and after the prosecutor knew the Petitioner had retained counsel to represent him, the initiation of the

[1] Vol. 1, Statement of Facts of trial proceedings (SF) pp. 2-85. The argument of counsel and the trial court's ruling appear at pp. 82-85.

conversations violated the Petitioner's right to counsel rendering the conversations (or recordings of them) inadmissible. He relied upon *Massiah v. United States,* 377 U.S. 201 (1964). The trial court denied the motion, concluding that because the conversations occurred before indictment, the conduct in this case was distinguishable from that in *Massiah.* On appeal, the issue raised herein was presented to the state appellate courts;[2] however, because the initial appellate opinion reversed the Petitioner's conviction upon state law dispositive of the federal issue, see Appendix A, *infra,* which became the focal issue of all subsequent appellate proceedings, the federal issue was never thereafter reached, despite the Petitioner's repeated efforts to have the issue discussed.[3]

REASONS FOR GRANTING THE WRIT

This case presents a Sixth Amendment issue substantially similar to that decided in *Maine v. Moulton, supra,* and a Fourteenth Amendment due process issue arising from the prosecutor's purposeful circumvention of the Petitioner's right to the benefit of counsel by a state prosecutor.

---

[2] See, e.g., Brief for the Appellee, pp. 7-9, Brief for the Appellee, No. 05-82-00819-CR, Tex.App.—Dallas; Brief for the Petitioner, pp. 6-8, No. 0140-84, Tex.Cr.App.; Appellant's Rebuttal to State's Response on Petition for Discretionary Review, pp. 1-2, No. 05-82-00819, Tex.App.—Dallas; Appellant's Supplemental Brief on Petition for Discretionary Review, No. 1163-85, Tex.Cr.App.; State's Response to Appellant's Supplement to his Petition for Discretionary Review, pp. 1-2, No. 1163-85, Tex.Cr.App.; Appellant's Motion for Rehearing on Petition for Discretionary Review, pp. 2-4, No. 1163-85, Tex.Cr.App.

[3] *Ibid.* In an effort to secure a ruling on his federal claim, the Petitioner cited, and the State responded to several decisions upon which the Petitioner relies in this petition, including *Maine v. Moulton,* ____ U.S. ____, 106 S.Ct. 477 (1985), and *Massiah.*

Argument

"The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice." *Maine v. Moulton, supra,* ____ U.S. at ____, 106 S.Ct. at 483. In order to implement this right and to protect a layman, who "requires the guiding hand of counsel at every stage of the proceedings against him," *Powell v. Alabama,* 287 U.S. 45, 68-69 (1932), this Court has fashioned a basic rule that "[o]nce the right to counsel has attached and been asserted, the State must of course honor it," *Maine v. Moulton, supra,* ____ U.S. at ____, 106 S.Ct. at 484, "and not interfere with the efforts of a defendant's attorney to act as a 'medium between [the suspect] and the State.' " *Moran v. Burbine,* ____ U.S. ____, ____, 106 S.Ct. 1135, 1145, 3186 (1986).

One form of prosecutorial "interference with the efforts of a defendant's attorney recognized by this Court as being violative of the Sixth and Fourteenth Amendments is the interrogation of the accused by a representative of the state at a time when he was entitled to the benefit of counsel. See *Spano v. New York,* 360 U.S. 315 (1959); *Massiah v. United States, supra; United States v. Henry,* 447 U.S. 264 (1980); *Maine v. Moulton, supra; Brewer v. Williams,* 430 U.S. 387 (1977).[4] In each case, the accused either had counsel or was entitled to counsel when the interrogation occurred. And, in each case, the accused was denied the benefit of counsel, either through the surreptitious nature of the interrogation, as in *Massiah, Henry,* and *Moulton,* or by direct police questioning, as in *Spano* and *Brewer.*

---

[4] Compare *Kuhlman v. Wilson,* ____ U.S. ____, 106 S.Ct. 2616, 2628-2631, 3212-3213 (1986), holding that the unsolicited confession made by an inmate to a jailhouse informant is not protected by the Sixth Amendment.

In this case, Lowe was not a passive listener, but was ordered by the prosecutor to engage the Petitioner in conversation aimed at eliciting incriminating statements.

There can be no question that the recorded telephone conversations between Lowe and the Petitioner constituted "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlman v. Wilson, supra,* ____ U.S. at ____, 106 S.Ct. at 2630. Lowe's telephone calls were deliberately made at the request and under the direction of the prosecutor for the specific purpose of eliciting incriminating statements from the Petitioner. This conduct is indistinguishable from the conduct condemned in *Massiah, Henry,* and *Moulton.*

At the time the conversations took place, the Petitioner's right to counsel had attached or had been asserted such that the state, through its prosecutor, "knowingly circumvent[ed] the accused's right to the assistance of counsel, "*Maine v. Moulton, supra,* ____ U.S. at ____, 106 S. Ct. at 490, or acted in such an offensive manner as to deprive the Petitioner of the fundamental fairness guaranteed by the Fourteenth Amendment. A complaint had been filed with the district attorney's offense prior to the telephone conversations.

The right to counsel attached because adversarial proceedings had been initiated.

Under Texas law, a complaint, which is the affidavit made before a magistrate or prosecutor that charges the commission of an offense, Tex.Code Crim.Pro. art. 15.04, initiates criminal proceedings against an accused. See *Wooldridge v. State,* 653 S.W.2d 811, 814 (Tex.Cr.App.1983); *Chapa v. State,* 420 S.W.2d 943, 944 (Tex.Cr.App.1967). Accordingly, the Petitioner's Sixth Amendment right to counsel had attached prior to the time the telephone conversations were made and recorded, thereby rendering those conversations inadmissible at the Petitioner's trial under the express holdings in *Massiah, Henry,* and *Moulton.*

The conversations constituted an abridgement of the Petitioner's right to the benefit of counsel.

Independent of whether the Petitioner's right to counsel had attached at the time of the telephone conversations, the fact remains that his right to counsel had been asserted in the most obvious form—the Petitioner's attorney personally advised the prosecutor that he (the Petitioner's counsel) had been engaged to represent the Petitioner in the charges that led to his conviction in this case. By thereafter instigating the telephone calls between Lowe and the Petitioner, the prosecutor interfered with the Petitioner's right to be represented by counsel in his dealings with the state vis-a-vis the charges against him.

"[T]he right to the assistance of counsel is shaped by the need for the assistance of counsel . . ." *Maine v. Moulton, supra,* ____ U.S. at ____, 106 S.Ct. at 484. That guarantee would be hollow indeed if it meant only that an accused had the right to counsel at a given moment without the accompanying benefit of counsel, such as the opportunity to be advised by counsel during prosecutorial interrogation. The requirement that the state "scrupulously honor"[5] an accused's right to counsel forms the backbone of the holding in *Massiah* and its progeny. Whatever else "honoring" the right to counsel may mean, it certainly means that the prosecutor may not arrange a surreptitious interrogation of the accused and purposefully exclude the presence and input of his counsel, whose existence as the accused's counsel is known to the prosecutor, knowing that "the results [of the interrogation] might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v.*

[5] Since the invocation of the right to counsel during interrogation must be "scrupulously honored," *Michigan v. Moseley,* 423 U.S. 96 (1975), the assertion of that right in the form of retaining counsel is entitled to no less respect by the prosecutor.

Wade, 388 U.S. 218, 224 (1967).[6] Having been notified by the prosecutor that criminal charges had been preferred against him, the Petitioner availed himself of his Sixth Amendment right to counsel and retained counsel to represent him. His counsel then advised the prosecutor of such fact and relationship. Under these facts, it is inconsistent with the right to counsel to say that the prosecutor was free to deprive the Petitioner of the benefit of his counsel by arranging for a secret interrogation that he knew or should have known would occur in counsel's absence. The right to counsel has no substance if the fundamental benefits it is intended to furnish are callously denied an accused by a prosecutor who purposefully elicits incriminating statements about the offense with which the accused is charged in the manner effected in this case.

The conversations were obtained under circumstances that are so offensive as to constitute a denial of fundamental fairness

The Fourteenth Amendment protects persons accused of crimes from state action that offends beliefs "fundamental to the 'traditions and conscience of our people.'" *Moran v. Burbine, supra,* ____ U.S. at ____, 106 S.Ct. at 1147, quoting *Rochin v. California,* 342 U.S. 165, 169 (1952). There are situations where prosecutorial deception violates due process. See, e.g., *Miller v. Pate,* 386 U.S. 1 (1967); *Alcorta v. Texas,* 355 U.S. 28 (1957). "[D]ue process requires fairness, integrity, and honor in the operation of the criminal justice system,

[6] We are not unaware of the statements in *Moran v. Burbine, supra,* that the Sixth Amendment right to counsel does not attach "at different times depending on the fortuity of whether the suspect . . . happens to have retained counsel prior to interrogation" because, "[b]y its very terms, it becomes applicable only when the government's role shifts from investigation to accusation." *Id.,* 106 S.Ct. at 1146. But in the case *sub judice,* the government's role, played by the prosecutor (not the police, as in *Moran v. Burbine*), was that of an accuser, not an investigator. A complaint had been filed with the prosecutor, of which the Petitioner was notified. We do not challenge the holding or the wisdom of *Moran v. Burbine* because, quite simply, has no application to the Petitioner's claim.

and in its treatment of the citizen's cardinal constitutional protections." *Moran v. Burbine, supra,* ____ U.S. at ____, 106 S.Ct at 1165 (dissenting opinion of STEVENS, J.).

The Court of Appeals condemnation of the prosecutor's conduct in using Lowe to deliberately obtain incriminating information from the Petitioner, as being violative of a disciplinary rule governing Texas lawyers, *Henrich v. State,* Appendix A, was not changed on review by the Court of Criminal Appeals. That court merely concluded that the violation of those rules did not require exclusion of the tapes under Texas law. If, as stated by Mr. Justice Stevens, "a lawyer is seen as an aid to the understanding and protection of constitutional rights, "*Moran v. Burbine, supra,* ____ U.S. at ____, 106 S.Ct at 1166, a violation of state disciplinary rules that also directly conflicts with the specific holdings of *Massiah, Henry,* and *Moulton* is inconsistent with the "fairness, integrity, and honor in the operation of the criminal justice system" required by due process any more than is the purposeful use of false testimony.

CONCLUSION

A writ of certiorari should be granted in this case to allow for the resolution, on the merits, of the federal constitutional issue not discussed by the state appellate courts, and to apply to

this case the well-settled decisions of this Court upon which the Petitioner relies.

Respectfully submitted,

MELVYN CARSON BRUDER
11817 Quincy Lane
Dallas, Texas 75230
(214) 351-5597

EDGAR A. MASON
12221 Merit Drive
Suite 850
Dallas, Texas 75251
(214) 991-0200

Counsel for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for A Writ of Certiorari were served upon Jim Mattox, Attorney General of the State of Texas, at his offices in Austin, Texas, via first class United States, postage prepaid, on the 19th day of January 1987.

MELVYN CARSON BRUDER

APPENDIX A

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 05-82-00819 CR

CHARLES MICHAEL HENRICH — FROM A DISTRICT COURT
Appellant,

VS.

THE STATE OF TEXAS, — OF DALLAS COUNTY, TEXAS
Appellee.

BEFORE JUSTICES STEPHENS, GUILLOT AND ROWE
OPINION BY JUSTICE GUILLOT
DECEMBER 12, 1983

This is an appeal from a conviction for theft of property of the value of $10,000 or more for which the jury assessed a punishment of five years and a fine of $10,000. Because the trial court failed to grant appellant's motion to suppress, we reverse and remand the case to the trial court.

At the outset we must point out that this is a case of first impression dealing with the issue of whether a violation of Supreme Court of Texas, Rules Governing the State Bar of Texas art. XII Section 8 (Code of Professional Responsibility) DR 7-104 (1973)[1] results in the suppression of evidence pursuant to TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979).

Appellant and an accomplice, Walter Lowe, made false invoices for material that was never shipped to their employer, Lone Star Gas. When the invoices were paid, appellant and

[1] Hereinafter cited as Texas Code of Professional Responsibility.

Lowe would pocket the money. Lone Star Gas discovered the fraud and filed a complaint with the District Attorney's office. The District Attorney wrote appellant and Lowe informing them of the complaint. Lowe then retained an attorney who accompanied him to the office of Steve Knoury, the assistant district attorney assigned to the case. There Lowe, at Khoury's instructions, agreed to tape phone conversations with appellant. He did so on three separate occasions. It is undisputed that at the time Khoury told Lowe to tape the conversations he knew that appellant had already retained a lawyer.

DR 7-104 provided in pertinent part that:

> (A) During the court of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In his first ground of error, appellant contends that the court erred in overruling his motion to suppress the taped conversations which were obtained in violation of state law. The crux of appellant's argument is that DR 7-104, Texas Code of Professional Responsibility, prohibited the assistant district attorney from causing the phone conversations to be made. He further contends that because of such prohibition, the evidence on the tapes was admitted in violation of TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979) which, simply put, states that no evidence obtained in violation of state law can be admitted.

The first question we must address is whether the disciplinary rules of the Code of Professional Responsibility have the status of law. The courts have held that they have the same force and effect as the Texas Rules of Civil Procedure have to

the matters to which they relate. State *ex rel.* Chandler v. Dancer, 391 S.W.2d 504 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.); Rattikan Title Co. v. Grievance Committee of the State Bar of Texas, 272 S.W.2d 948 (Tex. Civ. App.—Fort Worth 1954, no writ). The next question, then, is what force and effect have the Rules of Civil Procedure? The Rules of Civil Procedure have the same force and effect as statutes. Missouri Pacific Railroad Co. v. Cross, 501 S.W.2d 868 (Tex. 1973); Freeman v. Freeman, 160 Tex. 148, 327 S.W.2d 428 (1959). Consequently, when the assistant district attorney violated DR 7-104, it was the same as violating a statute. Because the evidence obtained through the taped conversations was obtained in violation of a statute, the trial judge should have granted appellant's motion to suppress pursuant to TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979). We sustain appellant's first ground of error and reverse and remand.

PATRICK C. GUILLOT
JUSTICE

PUBLISH

APPENDIX B

NO. 140-84

CHARLES MICHAEL HENRICH,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

Petition for Discretionary Review
from the
Court of Appeals,
Fifth Supreme Judicial District of Texas
(DALLAS COUNTY)

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted of theft of property of the value of $10,000 or more. The jury assessed punishment at five years' imprisonment and a fine of $10,000.

On appeal the appellant contended the trial court erred in denying his motion to suppress certain tape recordings for the reason that the tapes were obtained in violation of state law. The Dallas Court of Appeals noted the question was one of first impression—whether a violation of Supreme Court of Texas, Rules Governing the State Bar of Texas art. XII, § 8 (Code of Professional Responsibility), DR 7-104 (1973) results in the suppression of evidence pursuant to Article 38.23, V.A.C.C.P. That court held that DR 7-104 had the status of law, that the disciplinary rules of the Code of Professional Responsibility have the same force and effect as the Texas Rules of Civil Procedure as to matters to which they relate, that the said Rules of Civil Procedure have the same force and effect as statutes,

and that when the assistant district attorney violated DR 7-104, the Court should have granted the motion to suppress the tape recordings pursuant to the provisions of Article 38.23, V.A.C.C.P. The Dallas Court of Appeals thus sustained this first ground of error and reversed the conviction. *Henrich v. State,* 666 S.W.2d 185 (Tex.App.—Dallas 1983). We granted the State's petition for discretionary review to determine the correctness of the decision by the Court of Appeals.

Appellant, an employee of the Lone Star Gas Company, and an accomplice, who was in the forms business, created false invoices in the name of bogus companies for material which was paid for, but never shipped to the Lone Star Gas Company. Appellant and his accomplice pocketed the money paid by Lone Star Gas Company. The gas company discovered the thefts and appellant was questioned about the irregularities in the purchasing department. The matter was brought to the attention of the District Attorney.

During the investigation of the case, the District Attorney's office sent notices to the appellant and his accomplice, Walter Paul Lowe. Both Lowe and appellant retained counsel. Lowe and his attorney went to the District Attorney's office. Assistant District Attorney Steve Khoury asked for Lowe's cooperation in the investigation, and asked Lowe to tape record any telephone conversations he had with the appellant. At the time Khoury knew appellant was represented by counsel, but it was during the course of an investigation and the indictment against the appellant was not returned until several months later. Khoury explained at the suppression hearing his request to Lowe was to make sure that Lowe's story to the prosecution could be verified and confirmed, to prevent the appellant from taping conversations with Lowe and distorting them at a later date, and finally to discover facts important to the criminal investigation and any later indictment. While the record is not as clear as it could be, it appears that taped recordings were made in the district attorney's office when Lowe returned telephone calls originally

made by the appellant. Lowe was instructed not to talk to appellant without the tape recorder being in operation. Three such conversations were taped, two in August, 1981 and one in September, 1981. It was Khoury's testimony that he never personally communicated with the appellant.

Article 38.23, V.A.C.C.P. (1965), provides in part as follows:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution *or laws of the State of Texas,* or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case." (Emphasis supplied.)

Said DR 7-104 provides, in pertinent part, that:

> "(A) During the course of his representation of a client a lawyer shall not:
>
> > "(1) *Communicate or cause another to communicate* on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party *or is authorized by law to do so."* (Emphasis supplied.)

The very question before the Dallas Court of Appeals was before this Court only shortly thereafter in *Pannell v. State,* 666 S.W.2d 96 (Tex.Cr.App. 1984), which involved DR 7-104. There we held that the disciplinary rules of the Code of Professional Responsibility are not "laws" of the State of Texas as contemplated by Article 38.23, *supra.* For the reasons stated therein, we adhere to our decision in *Pannell.*[1]

---

[1] In Roy v. State, 608 S.W.2d 645, 651 (Tex.Cr.App. 1980), this Court rejected the "novel" proposition that evidence (videotape) should be suppressed under Article 38.23, supra, because the Shadetree Landscaping Company (a police "sting" operation to apprehend thieves) was not registered under the Assumed Name Statute. Tex. Bus. and Comm. Code, Article 36.10.

Although the State argues there are additional reasons[2] to reverse the judgment of the Court of Appeals, we rest our decision on *Pannell.*

---

[2] In his brief the District Attorney argues that even if DR 7-104 has the status of "law" within the meaning of Article 38.23, supra, the rule has no application to the facts in the instant case. He points out the Assistant District Attorney did not personally communicate with the appellant and did not cause Lowe to communicate with the appellant as it was the appellant who initiated each conversation. Lowe only returned the call once he was prepared to tape the conversation.

The State's Prosecuting Attorney (before the Court of Criminal Appeals) also argues that if DR 7-104 has the status of "law" the Court of Appeals overlooked the fact the prohibition contained therein applies "unless he . . . is authorized by law to do so." The argument is advanced that the prosecuting attorney is authorized by law to investigate alledged criminal violations and that is what the assistant district attorney was doing in the instant case, that prosecution necessarily entails investigation and that it is his duty not only to "make cases" against the guilty but to protect the innocent and see that justice is done. Cf. Article 2.01, V.A.C.C.P.

In Shepperd v. Alaniz, 303 S.W.2d 864 (Tex.Civ.App.-San Antonio 1957), it was stated:

> "It has always been the principal duty of the district and county attorneys to *investigate* and prosecute the violation of all criminal cases, including the election laws, and these duties cannot be taken away from them by the Legislature and given to others." (Emphasis supplied.)

In Thomas v. Cisneros, 596 S.W.2d 313 (Tex.Civ.App.-Austin 1980), the Court, at p.318, wrote:

> "Having received this information revealing a possible crime, it was the duty of the District Attorney to *investigate* and determine whether appellant had been joking . . . and any other circumstances material to the mens rea required by Section 36.06 of the Penal Code." (Emphasis added.) See also Missouri, K. & T. Ry. Co. of Texas v. Groseclose, 110 S.W. 477 (Tex.Civ.App. 1908, no writ history); Johnson v. Miller, 69 Iowa 562, 29 N.W. 743, 750 (1886); Attorney General's Opinions H-167 (11/30/73) and M-1180 (7/26/72); 27 C.J.S. 670-671, District and Pros. Attys., § 14(1); A.B.A. Standards for Criminal Justices, 2nd Ed., Standard 3-3.1.

The State's Prosecuting Attorney believes the exception in DR 7-104 is here applicable.

The judgment of the Court of Appeals is reversed and the cause remanded for consideration of other grounds of error urged.

ONION, Presiding Judge

Teague, J., dissents for reasons stated in his dissent in *Pannell.*
Clinton, J., not participating.
(Delivered July 24, 1985)
En banc

Publish

APPENDIX C

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

No. 05-82-00819-CR

CHARLES MICHAEL HENRICH, *Appellent,*

v.

THE STATE OF TEXAS, *Appellee.*

FROM A DISTRICT COURT of Dallas County, Texas

BEFORE JUSTICES STEPHENS, GUILLOT, AND MCCLUNG
OPINION BY JUSTICE GUILLOT
September 25, 1985

On remand from the Court of Criminal Appeals, we withdraw our former opinion and substitute the following.

This is an appeal from a conviction for theft of property with a value of $10,000 or more, for which the jury assessed a punishment of five years and a fine of $10,000. We affirm the conviction.

Appellant and an accomplice, Walter Lowe, made false invoices for material that was never shipped to their employer, Lone Star Gas. When the invoices were paid, appellant and Lowe would pocket the money. Lone Star Gas discovered the fraud and filed a complaint with the District Attorney's office. The District Attorney wrote appellant and Lowe informing them of the complaint. Lowe then retained an attorney who accompanied him to the office of Steve Khoury, the assistant district attorney assigned to the case. There Lowe, at Khoury's instructions, agreed to tape phone conversations with appellant.

He did so on three separate occasions. It is undisputed that at the time Khoury told Lowe to tape the conversations he knew that appellant had already retained a lawyer.

In his first ground of error, appellant contends that the court erred in overruling his motion to suppress the taped conversations which were obtained in violation of state law. The crux of appellant's argument is that DR 7-104, Texas Code of Professional Responsibility, prohibited the assistant district attorney from causing the phone conversations to be made.

DR 7-104 provides in pertinent part that:

> (A) During the course of his representation of a client a lawyer shall not:
>
> > (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

He further contends that because of such prohibition, the evidence on the tapes was admitted in violation of TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979) which, simply put, states that no evidence obtained in violation of state law can be admitted. This contention was overruled in *Pannell v. State*, 666 S.W.2d 96 (Tex. Crim. App. 1984) (en banc). We do likewise.

In his second ground of error, appellant contends that the trial court erred in denying his motion to suppress the evidence obtained from appellant's briefcase for the reason that such evidence was obtained during an illegal search. Contending that Vernon's Ann. C.C.P. art. 38.23 restricts searches by those who are not government officials, appellant states that the private investigator hired by Lone Star Gas could not search his briefcase. We need not reach this issue as the record reflects that appellant consented to the private investigator's exam-

ination of the contents of appellant's briefcase. Whether appellant's consent to allow examination of the briefcase was voluntary must be determined from the totality of the circumstances. *Paprsker v. State,* 484 S.W.2d 731, 737 (Tex. Crim. App. 1972). The totality of the circumstances in the instant case shows that the consent was voluntary. We' overrule appellant's second ground.

In his final ground of error, appellant contends that the trial court erred in overruling his best evidence objection to Walter Lowe's testimony concerning the taped conversations. The record reflects that the tapes were played to the jury; that appellant had the opportunity to cross-examine Lowe on his testimony as to what was stated in the tapes; and that Lowe's testimony was offered in lieu of the tapes. We overrule this ground.

Affirm.

PATRICK C. GUILLOT
Justice

PUBLISH

No. 86-1263

Supreme Court, U.S.
FILED
MAY 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1986

CHARLES MICHAEL HENRICH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

MARY F. KELLER
Executive Assistant
Attorney General for Litigation

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

**Counsel of Record*

QUESTION PRESENTED

WHETHER THE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE ADMISSION AT HIS TRIAL OF INCRIMINATING STATEMENTS MADE BY THE PETITIONER TO A CO-DEFENDANT, WHO WAS AN UNDISCLOSED PROSECUTION INFORMANT, AFTER A COMPLAINT HAD BEEN FILED AND AFTER THE PROSECUTOR WAS AWARE THAT THE PETITIONER WAS REPRESENTED BY COUNSEL.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Course of Proceedings 2

B. Statement of Facts 2

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING THE WRIT 3

I. THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION 3

II. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER HENRICH'S CLAIM BECAUSE IT WAS NOT PROPERLY RAISED IN OR DECIDED BY THE COURT BELOW 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases **Page**

Beck v. Washington, 369 U.S. 541 (1962) 4,6

Cardinale v. Louisiana, 394 U.S. 437 (1969) 3,4,6

Crowell v. Randell, 10 Pet. 368 (1836) 3

Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919) 4

Health v. Alabama, ____U.S.____, 106 S.Ct. 433 (1985) 3

Hill v. California, 401 U.S. 797 (1971) 3

Illinois v. Gates, 462 U.S. 213 (1983) 3

Maine v. Moulton, 474 U.S. ____, 106 S.Ct. 477 (1985) 5

Massiah v. United States, 377 U.S. 201 (1964) 4,5

Owings v. Norwood's Lessee, 5 Cranch 344 (1809) 3

Tacon v. Arizona, 410 U.S. 351 (1973) 3

Constitutions, Statutes and Rules

U.S. Const., amend. IV 2

U.S. Const., amend. XIV 2

28 U.S.C. § 1257(3) 2

Sup. Ct. R. 17 2

Judiciary Act of 1789, 20 § 25, 1 Stat. 85 3

No. 86-1263

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1986

CHARLES MICHAEL HENRICH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Fifth Texas Court of Appeals affirming Henrich's conviction is attached to the petition as Appendix C.

1. For clarity, respondent in this Court, the State of Texas, will be referred to as "the state." Petitioner, Charles Michael Henrich, will be referred to as "Henrich."

JURISDICTION

Henrich seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Henrich bases his claims on the sixth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings

Henrich was indicted for the felony offense of theft of property of the value of $10,000 or more. He pled not guilty and was tried by a jury, which on May 27, 1982, found him guilty and assessed punishment of imprisonment for five years and a fine of $10,000.

Henrich appealed to the Fifth Court of Appeals of Texas, which reversed the conviction on the ground that the admission in evidence of tape recorded statements violated state law (Appendix A to Petition). The state then filed a petition for discretionary review, which was granted by the Texas Court of Criminal Appeals. That court reversed the judgment of the court of appeals and remanded the case for consideration of Henrich's other grounds (Appendix B). On remand, the court of appeals affirmed the conviction (Appendix C) and subsequently denied Henrich's motion for rehearing. Henrich then filed a petition for discretionary review, which the Court of Criminal Appeals denied.

B. Statements of Facts

The state is in substantial agreement with Henrich's statement of the events which gave rise to his constitutional claim. As discussed below at 3-6, the state does not agree with Henrich's assertion that the question presented was properly raised in or decided by the court below.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the question presented.

This Court lacks jurisdiction to consider the question presented because it was not properly raised in or decided by the court below.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Henrich has advanced no special or important reason in this case, and none exists.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER HENRICH'S CLAIM BECAUSE IT WAS NOT PROPERLY RAISED IN OR DECIDED BY THE COURT BELOW.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, ____U.S.____, 106 S.Ct. 433, 436-37 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat.

85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana*, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

In the instant case, Henrich filed a pretrial motion seeking to suppress his statements to Lowe (Tr. 51). The motion listed six grounds for suppression, the first five of which were based on federal and state constitutional provisions proscribing unlawful searches and seizures. The sixth ground was that Henrich "was not given his Miranda warnings prior to speaking on the telephone" (*Id.*). Thus, this motion arguably raised the question presented herein. On appeal, however, Henrich raised only the following grounds:

1. The trial court committed reversible error in denying the appellant's motion to suppress the tape recordings for the reason that the tapes were obtained in violation of state law.

2. The trial court committed reversible error in denying the appellant's motion to suppress the evidence obtained from the appellant's briefcase for the reason that such evidence was obtained during an illegal search.

3. The trial court committed reversible error in overruling the appellant's best evidence objection to Walter Lowe's testimony concerning the tape recorded conversations.

Henrich's brief in the state court of appeals did not cite *Massiah v. United States*, 377 U.S. 201 (1964); the only citation of *Massiah* was in the state's brief. The ground of error attacking admission of the tape recordings was based solely on state law.

The court of appeals reversed the conviction, solely on the basis of the state law provisions relied on by Henrich. The state then sought, and obtained, discretionary review by the Texas Court of Criminal Appeals, which reversed the judgment of the court of appeals, again strictly on state law grounds. In the Court of Criminal Appeals, as in the court of appeals, the only citation of *Massiah* was in the state's brief. Henrich misrepresents the record in asserting that the issue was raised at pages 6-8 of his brief in the Court of Criminal Appeals (Petition at 4 n.2). Nowhere in that brief did Henrich raise the federal constitutional issue presented herein; Henrich's brief in the Court of Criminal Appeals was devoted solely to the state law issues which formed the basis of the decisions of both state appellate courts.

After the case was remanded to the intermediate state appellate court for consideration of the other issues raised by Henrich, that court affirmed the conviction without further briefing by Henrich or the state. Henrich then filed a motion for rehearing in which he reurged, *verbatim*, the first point raised in his original brief. Although this ground challenged the admission in evidence of the tape recorded statements, the body of the motion for rehearing consisted of argument challenging the admission of evidence seized in a search of Henrich's briefcase. In any event, the motion for rehearing did not in any way raise the federal constitutional claim presented to this Court.

After the court of appeals denied rehearing, Henrich filed a petition for discretionary review in the Court of Criminal Appeals in which he raised only one issue: the validity of the search of his briefcase. Thereafter, Henrich filed a supplemental brief in which he raised the following issue:

> The actions of the district attorney in having witness Walter Lowe tape record conversations with the Appellant violated Appellant's rights sixth Amendment right to counsel.

Henrich's supplemental brief did not cite *Massiah* but did rely on *Maine v. Moulton*, 474 U.S. ____, 106 S.Ct. 477 (1985).

Henrich seeks review by this Court of the decision of the Fifth

Court of Appeals of Texas. The question presented was not raised in or considered by that court; instead, it was raised, belatedly, only in Henrich's supplemental brief in the Court of Criminal Appeals. Because the issue was not presented to or decided by the court below, this Court lacks jurisdiction to consider it. *Beck v. Washington; Cardinale v. Louisiana.*

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Captiol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

*Counsel of Record